

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

STEVEN TRANG,

Plaintiff/Counterdefendant

v.

BANK OF GEORGE, *et al.*,

Defendants/Counterclaimants

Case No.: 2:17-cv-00162-APG-EJY

**Order Granting in Part Counterdefendant  
Trang's Motion to Dismiss**

[ECF No. 55]

Steven Trang (Trang) sues defendant Bank of George, his former employer, and defendant T. Ryan Sullivan, the Bank's president, for wrongful termination under the False Claims Act (FCA) and Nevada state law.<sup>1</sup> ECF No. 23. Trang alleges that the defendants wrongfully terminated him for investigating the Bank's scheme to fraudulently induce the Small Business Administration (SBA) to guarantee loans that the defendants knew did not meet SBA guidelines. The defendants<sup>2</sup> filed counterclaims against Trang for (1) breach of the parties' confidentiality agreement and the Bank's Code of Ethics, (2) breach of the duty of loyalty, (3) breach of the covenant of good faith and fair dealing, (4) negligence, (5) breach of fiduciary duty, (6) intentional interference with prospective business advantage, and (7) defamation per se.

<sup>1</sup> Trang originally brought this case as a qui tam action, but the United States of America was dismissed, and Trang now proceeds on his individual claims against the Bank and Sullivan. *See* ECF Nos. 1; 16; 22; 23.

<sup>2</sup> The counterclaim identifies Sullivan as a counterclaimant but none of the counterclaims refers to him as asserting the claim, and it does not appear that Sullivan would be entitled to bring at least some of the claims, such as the contractual claims. Because I grant the defendants leave to amend, they should consider which counterclaims are appropriately asserted by which defendant/counterclaimant.

1           Trang moves to dismiss the counterclaims under Nevada’s anti-SLAPP statute, the  
2 *Noerr-Pennington* doctrine, and public policy because the counterclaims seek to impose civil  
3 liability for Trang’s acts of petitioning the government. Alternatively, he contends the  
4 counterclaims are not plausibly alleged. Trang seeks an award of costs and attorney’s fees, as  
5 well as \$10,000 in statutory damages, under Nevada’s anti-SLAPP statute.

6           The Bank and Sullivan respond that the motion fails under the anti-SLAPP statute  
7 because Trang did not meet his initial burden of showing his communications were in good faith.  
8 The defendants also argue their claims are not based on Trang’s reports to the government.  
9 Instead, they assert Trang stole and disclosed confidential loan documents to “unknown  
10 sources.” ECF No. 61 at 9. They also assert he engaged in other non-petitioning activity, such as  
11 trying to use confidential information to secure a promotion, failing to fulfill his job duties,  
12 conducting rogue investigations, and failing to internally report the alleged fraud. The  
13 defendants argue that if I deny the anti-SLAPP motion, I should grant them fees and costs.  
14 Finally, they contend their claims are adequately pleaded.

15           I deny Trang’s anti-SLAPP motion because he did not meet his initial burden of showing  
16 by a preponderance of the evidence that his communications to the government were in good  
17 faith. I deny both sides’ requests for fees and costs. I grant Trang’s motion to dismiss the  
18 counterclaims with leave to amend, except for a portion of the defamation per se claim, which I  
19 dismiss with prejudice because Trang’s statements in the unsealed complaint are absolutely  
20 privileged.

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1 **I. ANALYSIS**

2 **A. Anti-SLAPP**

3 Under Nevada’s anti-SLAPP statute, a “person who engages in a good faith  
4 communication in furtherance of the right to petition or the right to free speech in direct  
5 connection with an issue of public concern is immune from any civil action for claims based  
6 upon the communication.” Nev. Rev. Stat. § 41.650. A defendant (or in this case, a  
7 counterdefendant) may file a special motion to dismiss if the defendant can show “by a  
8 preponderance of the evidence, that the claim is based upon a good faith communication in  
9 furtherance of the right to petition or the right to free speech in direct connection with an issue of  
10 public concern.” *Id.* § 41.660(3)(a). As relevant here, a good faith communication in furtherance  
11 of the right to petition means:

12 [c]ommunication of information or a complaint to a Legislator, officer or  
13 employee of the Federal Government, this state or a political subdivision  
14 of this state, regarding a matter reasonably of concern to the respective  
15 governmental entity; [or]  
16 [a w]ritten or oral statement made in direct connection with an issue under  
17 consideration by a legislative, executive or judicial body, or any other  
18 official proceeding authorized by law . . .

19 which is truthful or is made without knowledge of its falsehood.

20 *Id.* §§ 41.637(2)-(3). If the defendant makes this initial showing, the burden shifts to the  
21 plaintiff to show “with prima facie evidence a probability of prevailing on the claim.” *Id.*  
22 § 41.660(3)(b).

23 Trang has not presented any evidence in support of his motion, and he therefore  
has not shown by a preponderance of the evidence that he made good faith  
communications that were truthful or without knowledge of falsehood. Because Trang  
has not met his initial burden, I deny his anti-SLAPP motion. I deny the defendants’

1 request for fees because the motion was not wholly frivolous or vexatious. *See Nev. Rev.*  
2 *Stat.* 41.670(2). The counterclaims, though often pleaded in conclusory fashion as  
3 discussed below, appear to be directed at Trang’s communications with the federal  
4 government and filings made in this FCA case, and thus arguably implicate the anti-  
5 SLAPP statute.

#### 6 **B. Failure to State a Claim**

7 In considering a motion to dismiss, I take all well-pleaded allegations of material fact as  
8 true and construe the allegations in a light most favorable to the non-moving party. *Kwan v.*  
9 *SanMedica Int’l*, 854 F.3d 1088, 1096 (9th Cir. 2017). However, I do not assume the truth of  
10 legal conclusions merely because they are cast in the form of factual allegations. *Navajo Nation*  
11 *v. Dep’t of the Interior*, 876 F.3d 1144, 1163 (9th Cir. 2017). A plaintiff must make sufficient  
12 factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550  
13 U.S. 544, 556 (2007). Such allegations must amount to “more than labels and conclusions, [or] a  
14 formulaic recitation of the elements of a cause of action.” *Id.* at 555.

15 Trang contends each of the counterclaims fails under the *Noerr-Pennington* doctrine and  
16 related public policy concerns about retaliation against FCA whistleblowers. “The *Noerr-*  
17 *Pennington* doctrine derives from the First Amendment’s guarantee of ‘the right of the people  
18 . . . to petition the Government for a redress of grievances.’” *Sosa v. DIRECTV, Inc.*, 437 F.3d  
19 923, 929 (9th Cir. 2006) (quoting U.S. Const. amend. I). Under this doctrine, “those who  
20 petition any department of the government for redress are generally immune from statutory  
21 liability for their petitioning conduct.” *Id.* “In determining whether the burdened conduct falls  
22 under the protection of the Petition Clause, [courts] must give adequate breathing space to the  
23

1 right of petition.” *Id.* at 931-32 (quotation omitted). Consequently, immunity applies not only to  
 2 direct petitioning activity, but also to conduct incidental to it. *Id.* at 934-35.

3 Although the *Noerr-Pennington* doctrine arose out of “cases holding that the First  
 4 Amendment Petition Clause immunizes acts of petitioning the legislature from antitrust  
 5 liability,” it “has since been applied to actions petitioning each of the three branches of  
 6 government, and has been expanded beyond its original antitrust context.” *Theme Promotions,*  
 7 *Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006-07 (9th Cir. 2008). As relevant here, the  
 8 doctrine may apply to bar state law claims. *Id.*

9 “Not all petitioning activity is immunized, however.” *Kearney v. Foley & Lardner, LLP*,  
 10 590 F.3d 638, 644 (9th Cir. 2009). Courts have recognized an exception for “sham” petitioning  
 11 conduct. *Id.* To fall within the sham exception in the litigation context, the petitioning activity  
 12 “must be objectively baseless in the sense that no reasonable litigant could reasonably expect  
 13 success on the merits.” *Theme Promotions*, 546 F.3d at 1007. If the challenged litigation is  
 14 objectively baseless, then the court considers whether the litigant acted with an improper motive.  
 15 *Id.*; *Sosa*, 437 F.3d at 934. Examples of when the sham exception might apply include:  
 16 (1) “where the lawsuit is objectively baseless” and the litigant’s “motive in bringing it was  
 17 unlawful,” (2) where the litigant files “a series of lawsuits . . . without regard to the merits and  
 18 for an unlawful purpose,” and (3) if the litigant makes “intentional misrepresentations to the  
 19 court” that “deprive the litigation of its legitimacy.” *Sosa*, 437 F.3d at 938 (simplified).

#### 20 1. Breach of Contract

21 The first counterclaim alleges that Trang breached a confidentiality agreement with the  
 22 Bank by taking confidential loan documents from the Bank and refusing to return them despite  
 23 being asked to do so. ECF No. 47 at 26. The Bank also alleges that in January 2016, Trang

1 revealed to the Bank that he had taken documents from the Bank after his termination to  
2 “leverage [the Bank] into settling his claims.” *Id.*

3       Trang argues this claim is implausible because it alleges Trang attempted to settle his  
4 claims against the Bank in January 2016, but he had not been terminated by that date. He also  
5 argues that the claim is pleaded in conclusory fashion, so he cannot determine whether it is based  
6 on his petitioning activity, and therefore potentially subject to the *Noerr-Pennington* doctrine or  
7 against public policy. But he contends that because the Bank refers to him appropriating loan  
8 documents, and that is what he disclosed to the government in support of his FCA claim, he  
9 cannot be sued for this activity under the *Noerr-Pennington* doctrine and public policy.

10       The Bank responds that the breach of contract counterclaim is not based on Trang’s  
11 disclosures to the government. It contends the claim is based on Trang taking and disclosing  
12 confidential loan documents. It asserts that “the extent of Trang’s breaches are unknown:  
13 discovery will reveal how many files Trang converted and who received same, aside from the  
14 government.” EF No. 61 at 7. The Bank contends that this claim is based on Trang’s conduct  
15 before he made his FCA claims.

16       The breach of contract claim is pleaded in too conclusory a fashion to determine whether  
17 it is barred by *Noerr-Pennington* or public policy. The Bank alleges that Trang breached the  
18 confidentiality agreement by appropriating and disclosing loan documents, but it does not  
19 identify what loan documents are at issue and to whom, besides the government, Trang allegedly  
20 disclosed them. Trang’s FCA claim is based on his disclosure of loan documents to the  
21 government, and the defendants appear to have no information that Trang disclosed loan  
22 documents to anyone other than the government, because they concede that it is unknown who  
23

1 else may have seen the loan documents. Their hope that discovery will reveal other disclosures  
2 is insufficient to avoid dismissal for failure to state a plausible claim.

3 The allegation that Trang took loan documents after his termination to leverage “settling  
4 [his] claims” is likewise conclusory and implausible as currently alleged. It is unclear what  
5 claims Trang was attempting to settle or what documents he was using. The counterclaim  
6 alleges that in January 2016, Trang revealed that he had taken documents after his termination,  
7 but Trang was not terminated until months later. *See* ECF No. 47 at 18 (admitting Trang was  
8 terminated on August 26, 2016). Additionally, although the Bank generally alludes to the sham  
9 exception, the counterclaims have no factual allegations that Trang’s FCA claims were  
10 objectively baseless or that Trang acted with an improper motive.

11 I therefore dismiss this claim. However, because it is not clear that amendment would be  
12 futile, I grant the defendants leave to amend if facts exist to do so. *Hoang v. Bank of Am., N.A.*,  
13 910 F.3d 1096, 1102-03 (9th Cir. 2018) (“Leave to amend can and should generally be given,  
14 even in the absence of such a request by the party,” so long as amendment would not be futile).

## 15 2. Breach of the Duty of Loyalty

16 Count two alleges that Trang breached his duty of loyalty as a Bank employee by:  
17 (1) conducting “rogue investigations and audits,” (2) failing to properly analyze borrower  
18 financials and loan underwriting, (3) failing to report potential fraud, (4) obtaining confidential  
19 information and then trying to use that information to demand a promotion, and (5) approving  
20 loan applications he later claimed were fraudulent. ECF No. 47 at 27-28.

21 Trang moves to dismiss this claim, arguing that there are no allegations that he acted  
22 contrary to the Bank’s interests, impermissibly disclosed confidential information, or usurped the  
23 Bank’s opportunities. He contends that the Bank’s alleged dissatisfaction with his job

1 performance and its complaint that he failed to internally report the potential fraud arise directly  
2 out of his investigation into, and reports of, the Bank's fraud to the government, and therefore  
3 the claim is barred by *Noerr-Pennington*, and public policy. He also contends that mere failure  
4 to perform his job in a manner satisfactory to the Bank does not amount to a breach of the duty  
5 of loyalty. And he argues this claim effectively seeks contribution or indemnification for his  
6 alleged participation in the fraudulent activity, which is against public policy. Finally, he argues  
7 that to the extent this claim is based on something other than his protected activities, the claim is  
8 pleaded in conclusory fashion.

9 The Bank responds that this claim is based on Trang's failure to properly analyze  
10 borrower financials and loan underwriting, provide credible leads, or report misconduct, as well  
11 as his use confidential information to demand a promotion, so it is not based on his  
12 communications with the government. The Bank also argues that its allegations that Trang took  
13 confidential bank information and conducted rogue investigations and audits is not directly  
14 connected to ongoing litigation. Finally, the Bank argues that contribution or indemnity do not  
15 apply in this case because the Bank will not have any liability under the FCA to offset due to the  
16 FCA claim against it being dismissed.

17 As I stated in *Wilson v. Nevada Affordable Housing Assistance Corp.*, "Nevada courts  
18 tend to follow the Restatement of Agency, which states that an employee owes a duty of loyalty  
19 to act solely in the interests of her employer within the business area for which she is employed."  
20 No. 2:15-cv-01387-APG-CWH, 2017 WL 1276055, at \*4 (D. Nev. Mar. 30, 2017) (citing  
21 Restatement (Second) of Agency § 387 ("Unless otherwise agreed, an agent is subject to a duty  
22 to his principal to act solely for the benefit of the principal in all matters connected with his  
23 agency.")); *White Cap Indus., Inc. v. Ruppert*, 67 P.3d 318, 319 (Nev. 2003) (following the



1 Restatement (Second) of Agency § 381 and finding no breach of the duty of loyalty by failing to  
 2 disclose another employee's preparations to compete with their employer)). "This district has  
 3 concluded that employees, even those who are not officers or directors, owe a duty of loyalty."  
 4 *Id.* (citing *New England Life Ins. Co. v. Lee*, No. 2:14-CV-01797-JCM-NJK, 2015 WL 1413391,  
 5 at \*6 (D. Nev. Mar. 27, 2015); *Metlife Bank, N.A. v. Evergreen Moneysource Mortg. Co.*, No.  
 6 2:10-CV-00288-RLH-PAL, 2010 WL 2541729, at \*2 (D. Nev. June 17, 2010)). Examples of  
 7 breaches of the duty of loyalty include acting contrary to the employer's interests, disclosing its  
 8 confidential information to outside sources to the employer's detriment, competing against the  
 9 employer, or usurping an opportunity that belongs to the employer. *See id.*; Restatement  
 10 (Second) of Agency, §§ 388-89, 393, 395-96.

11 *a. Investigations and Audits*

12 This claim is also too conclusory to determine if it is barred by *Noerr-Pennington* or  
 13 public policy. As currently pleaded, it appears to be based on Trang's investigation of a potential  
 14 fraudulent scheme to induce the SBA to approve loans it otherwise would not have approved.  
 15 His investigations thus were incidental to and in furtherance of his FCA claim, and a claim based  
 16 on that conduct would be barred *Noerr-Pennington*. Because this claim is pleaded in conclusory  
 17 fashion and it is not clear that amendment would be futile, I will allow the Bank to amend if facts  
 18 exist to do so.

19 *b. Failing to Analyze Financials and Underwriting*

20 This portion of the duty of loyalty claim is not barred by the *Noerr-Pennington* doctrine  
 21 or public policy at this stage of the proceedings because it does not appear, on its face, to be  
 22 based on any petitioning activity or conduct incidental to petitioning activity. Instead, it is based  
 23 on Trang's alleged failure to perform his job because he did not properly analyze financials and

1 loan underwriting. Trang contends that this portion of the claim is really based on his refusal to  
2 approve fraudulent loans. But that is not how it is pleaded, and Trang's argument raises a factual  
3 dispute not suitable for resolution at dismissal.

4 The defendants have not pointed to case law that would support the conclusion that poor  
5 job performance alone is sufficient to constitute a breach of the duty of loyalty. The defendants  
6 cite to *Burch ex rel. United States v. Piqua Engineering, Inc.*, but that case stated that improperly  
7 performing job duties may support a breach of contract claim. 145 F.R.D. 452, 456 (S.D. Ohio  
8 1992). The duty of loyalty claim in that case was based on allegations that the employees made  
9 "false and damaging statements about [the employer] to the media, based on information they  
10 acquired during the course of their employment . . . ." *Id.* Consequently, I dismiss this portion of  
11 the breach of duty of loyalty claim for failure to state a claim. I grant the Bank leave to amend if  
12 facts exist to do so.

13 *c. Failing to Report Fraud*

14 A defendant in an FCA action cannot assert counterclaims for contribution or  
15 indemnification from the relator-employee even if the relator was engaged in the alleged  
16 fraudulent activity. *See Morts., Inc. v. U.S. Dist. Ct. for the Dist. of Nev.*, 934 F.2d 209, 213-14  
17 (9th Cir. 1991). Courts have also disallowed counterclaims that, "if prevailed on, would end in  
18 the same result." *Id.* at 214. However, this rule applies only where the counterclaim would "have  
19 the effect of offsetting liability" or where the counterclaim is "depend[e]nt on a qui tam  
20 defendant's liability." *United States ex rel. Madden v. Gen. Dynamics Corp.*, 4 F.3d 827, 830-31  
21 (9th Cir. 1993). Even dependent counterclaims may proceed "until the qui tam defendant's  
22 liability is established." *Cell Therapeutics, Inc. v. Lash Grp., Inc.*, 586 F.3d 1204, 1208 (9th Cir.  
23 2009), *as amended on denial of reh'g and reh'g en banc* (Jan. 6, 2010). "If [the] qui tam

1 defendant is found liable, the counterclaims can then be dismissed on the ground that they will  
2 have the effect of providing for indemnification or contribution. On the other hand, if a qui tam  
3 defendant is found not liable, the counterclaims can be addressed on the merits.” *Id.* at 1209  
4 (quotation omitted).

5       Although the FCA claim against the Bank has been dismissed, that dismissal was  
6 without prejudice, so it is possible that the Bank may need to offset liability at some point.  
7 Additionally, Trang may be able to show, in support of his own claims, that the defendants  
8 retaliated against him for revealing their fraudulent scheme. If he shows the defendants were in  
9 fact engaged in a fraudulent scheme, it would be against public policy to allow the Bank to  
10 recover from him for not first reporting the defendants’ own fraud to them. *See U.S. ex rel.*  
11 *Miller v. Bill Harbert Int’l Const., Inc.*, 505 F. Supp. 2d 20, 29 (D.D.C. 2007) (disallowing a  
12 counterclaim that the relator “should have informed the defendant before informing the  
13 government” because that “would place affirmative duties on a relator that the FCA does not  
14 envision” and “would create the perverse result of making a truthful relator pay to offset the  
15 liability of a wrongdoing FCA defendant”). The Bank would be seeking to hold a qui tam relator  
16 liable for not saving it from its own fraudulent scheme, which would be the effective equivalent  
17 of contribution or indemnification. Thus, if Trang shows the defendants engaged in the alleged  
18 fraudulent scheme, then this claim will be dismissed on public policy grounds.

19       While the Ninth Circuit allows this type of claim to proceed pending resolution of  
20 whether the Bank engaged in the alleged fraud, the counterclaim must plausibly allege a breach  
21 of the duty of loyalty that harmed the Bank. It currently does not do so because it is unclear  
22 from the counterclaim’s allegations how the Bank was harmed by Trang’s failure to report the  
23

1 fraud to the Bank earlier if the Bank was not engaged in a fraud. But because it is not clear that  
2 amendment would be futile, I grant leave to amend this claim if facts exist to do so.

3 *d. Using Confidential Information to Demand a Promotion*

4 The breach of the duty of loyalty claim based on Trang's alleged attempt to use  
5 confidential information to demand a promotion is pleaded in too conclusory a fashion to  
6 plausibly state a claim. The counterclaim is silent on what confidential information Trang  
7 obtained, how he attempted to use it to demand a promotion, or when he allegedly did so.  
8 Absent plausible allegations of this alleged breach, it is also impossible to analyze whether it  
9 may run afoul of *Noerr-Pennington* or public policy. I therefore dismiss this claim, with leave to  
10 amend if facts exist to do so.

11 *e. Approving Loan Applications Trang Later Claimed Were Fraudulent*

12 This portion of the breach of the duty of loyalty claim raises similar concerns as the claim  
13 that Trang failed to report the alleged fraud to the Bank. If the loans were in fact fraudulent, then  
14 the Bank is seeking to hold Trang liable for his alleged participation in the fraud, which is not  
15 permitted as it effectively seeks contribution or indemnification. If the loans were not  
16 fraudulent, then the Bank has failed to plausibly allege any harm caused by Trang signing off on  
17 loans he later claimed were fraudulent. I therefore dismiss this claim. However, because it is not  
18 clear that amendment would be futile, I grant leave to amend if facts exist to do so.

19 3. Breach of the Implied Covenant of Good Faith and Fair Dealing

20 Count three alleges Trang breached the implied covenant of good faith and fair dealing in  
21 the confidentiality agreement and the Bank's code of ethics when he failed to provide the Bank  
22 with any information to support his allegations of misconduct. ECF No. 47 at 28-29. Trang  
23 contends this claim is based on his protected petitioning activity of reporting the fraud to the

1 government, so it is barred by *Noerr-Pennington* and public policy because he need not first raise  
2 his concerns of wrongdoing with the alleged wrongdoer, as that would allow for retaliation. The  
3 Bank responds that this claim is based on Trang's failure to internally report to the Bank the  
4 misconduct he alleges. The Bank thus contends it is not based on his reporting to the  
5 government, so *Noerr-Pennington* does not apply.

6 This claim fails for the same reasons discussed above with respect to the breach of the  
7 duty of loyalty resting on allegations that Trang did not internally report the fraud. I therefore  
8 dismiss it, with leave to amend if facts exist to do so.

#### 9 4. Negligence

10 Count four alleges that Trang owed the Bank a duty of care while carrying out his duties  
11 as a vice president of the Bank, and that he breached that duty when he conducted rogue  
12 investigations, took confidential information, and disclosed that information. ECF No. 47 at 29-  
13 30. Trang argues this claim is based on his protected petitioning activity and should be  
14 dismissed under *Noerr-Pennington* and public policy. The Bank argues that this claim is based  
15 on "rogue investigations and document theft," and there is no direct connection between Trang's  
16 conduct and ongoing litigation because Trang's conduct took place before he reported the  
17 alleged fraud to the government.

18 This claim is also too conclusory to determine if it is barred by *Noerr-Pennington* or  
19 public policy. As currently pleaded, it appears to rest on Trang's protected activities and conduct  
20 in furtherance of his FCA claim. Because the claim is pleaded in conclusory fashion, it is  
21 possible that the Bank is referring to some investigations, confidential information, or disclosures  
22 other than those related to Trang's FCA claim. I therefore grant leave to amend if facts exist to  
23 do so.

1                   5. Breach of Fiduciary Duty

2           Count five alleges that Trang owed a fiduciary duty to the Bank to report improper or  
3 illegal conduct, but he failed to report potentially fraudulent conduct. ECF No. 47 at 30. Trang  
4 argues that he was not a corporate officer or director, so he owed no fiduciary duty to the Bank.  
5 He also argues that this claim likewise arises from his protected activity, so it is barred. Finally,  
6 he contends this is duplicative of the duty of loyalty claim, and so should be dismissed.

7           The Bank does not respond to Trang's argument that he does not owe a fiduciary duty  
8 because he is not an officer or director. I therefore grant this portion of Trang's motion as  
9 unopposed. LR 7-2(d). Additionally, this claim suffers from similar defects discussed with  
10 respect to the other failure to report claims. However, I grant the Bank leave to amend if facts  
11 exist to do so.

12                   6. Intentional Interference with Prospective Business Advantage

13           Count six alleges the Bank has prospective economic relationships with clients and  
14 potential clients, Trang knew about these relationships, Trang "acted in a manner so as to prevent  
15 these economic relationships from occurring," he did so without privilege or justification, and  
16 the Bank's business was actually disrupted. ECF No. 47 at 30-31. Trang argues that this claim is  
17 based on his petitioning activity and is therefore barred. He also contends that the interference  
18 must be improper or unlawful, and he lawfully pursued his FCA claim against the Bank. The  
19 Bank responds that this claim is not based on Trang's communications with the government.

20           This claim is merely a recitation of the cause of action's elements and is pleaded in so  
21 conclusory a fashion that there is no factual content. It is unclear what actions Trang allegedly  
22 took, besides reporting the alleged fraud to the government and filing this action, that form the  
23 basis of this claim. I therefore cannot determine whether it is barred by *Noerr-Pennington* or

1 public policy. However, like the Bank's other counterclaims, it is not clear that amendment  
2 would be futile, so I grant leave to amend.

3 7. Defamation Per Se

4 Count seven alleges that Trang made false and defamatory statements about the Bank by  
5 stating that it was engaged in illegal activity by defrauding the government. ECF No. 47 at 31.  
6 This claim alleges that "upon unsealing the Complaint and including facts in which the Court  
7 had already made its ruling," Trang "made an unprivileged publication of his statements"  
8 regarding the Bank's alleged illegal activity. *Id.*

9 Trang argues this claim fails because the only statement identified is his complaint, and  
10 that is a privileged communication. He also disputes the characterization that the government  
11 refused to prosecute the FCA claims or that the court dismissed those claims as unmeritorious.  
12 Rather, he contends the government chose not to prosecute because it had not suffered a loss. He  
13 further contends there has been no finding as to whether the Bank engaged in illegal activity.

14 The Bank responds that the defamation per se claim is based on statements other than  
15 those in the unsealed complaint "and discovery will reveal as much." ECF No. 61 at 13. As to  
16 the statements in the complaint, the Bank argues that it has shown that those statements were  
17 meritless because the United States moved to dismiss the FCA claims that Trang brought on the  
18 government's behalf. The Bank argues that Trang's statements in the complaint are not  
19 absolutely privileged because it contends the privilege does not extend to statements made in an  
20 initial court filing.

21 To allege a claim for defamation, a plaintiff must allege: "(1) a false and defamatory  
22 statement of fact by the defendant concerning the plaintiff; (2) an unprivileged publication to a  
23 third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages."

1 *Pope v. Motel 6*, 114 P.3d 277, 315 (Nev. 2005). A statement is defamatory if it “would tend to  
2 lower the subject in the estimation of the community, excite derogatory opinions about the  
3 subject, and hold the subject up to contempt.” *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 88  
4 (Nev. 2002) (quotation omitted). If the defamatory statement “imputes a person’s lack of fitness  
5 for trade, business, or profession, or tends to injure the plaintiff in his or her business, it is  
6 deemed defamation per se and damages are presumed.” *Clark Cnty. Sch. Dist. v. Virtual Educ.*  
7 *Software, Inc.*, 213 P.3d 496, 503 (Nev. 2009) (quotation omitted).

8 To the extent this claim is based on statements other than those in the unsealed complaint,  
9 the counterclaim does not plausibly allege a claim. It does not state facts regarding what  
10 statement was made, why it is false and defamatory, to whom Trang made the statement, that the  
11 statement was unprivileged, or fault. Because it is not clear that amendment would be futile, I  
12 grant leave to amend if facts exist to do so.<sup>3</sup>

13 However, I dismiss with prejudice the defamation claim based on statements in Trang’s  
14 unsealed complaint. Nevada recognizes “the long-standing common law rule that  
15 communications uttered or published in the course of judicial proceedings are absolutely  
16 privileged.” *Fink v. Oshins*, 49 P.3d 640, 643 (Nev. 2002) (quotation omitted). This privilege  
17 “precludes liability even where the defamatory statements are published with knowledge of their  
18 falsity and personal ill will toward the plaintiff.” *Id.* (quotation omitted). And it “applies not  
19 only to communications made during actual judicial proceedings, but also to communications  
20 preliminary to a proposed judicial proceeding.” *Id.* at 644 (quotation omitted).

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23 <sup>3</sup> If the Bank chooses to amend this claim, I direct its attention to *Clark County School District v. Virtual Education Software, Inc.* for the difference between defamation per se and business disparagement. 213 P.3d 496, 504-05 (Nev. 2009).



1 “[F]or the privilege to apply (1) a judicial proceeding must be contemplated in good faith  
2 and under serious consideration, and (2) the communication must be related to the litigation.”  
3 *Clark Cnty. Sch. Dist.*, 213 P.3d at 503. Whether the privilege applies is a question of law for  
4 the court. *Id.* at 502.

5 Statements in Trang’s complaint that the defendants were engaged in a fraud scheme  
6 were made during an actual judicial proceeding and are related to his claims that the defendants  
7 retaliated against him for pursuing the FCA claim. His statements thus are absolutely privileged.  
8 The Bank’s position that the privilege does not apply to statements in a complaint is meritless.  
9 Because amendment would be futile, I deny leave to amend to state a defamation or other related  
10 claim based on Trang’s statements in the unsealed complaint in this case. *See Zucco Partners,*  
11 *LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009), *as amended* (Feb. 10, 2009) (stating  
12 leave to amend may be denied where amendment would be futile).

## 13 II. CONCLUSION

14 I THEREFORE ORDER that plaintiff/counterdefendant Steven Trang’s motion to  
15 dismiss (**ECF No. 55**) is **GRANTED in part**. The motion is denied under Nevada’s anti-  
16 SLAPP statute. The motion is granted as otherwise set forth in this order.

17 I FURTHER ORDER that defendants/counterclaimants Bank of George and T. Ryan  
18 Sullivan may file amended counterclaims consistent with this order, if facts exist to do so.  
19 Failure to file amended counterclaims by March 25, 2022 will result in the counterclaims in ECF  
20 No. 47 being dismissed with prejudice.

21 DATED this 26th day of February, 2022.

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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE